UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAZVAN HOTARANU and LUIS FELIX, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

STAR NISSAN INC., JOHN KOUFAKIS SR., JOHN KOUFAKIS JR., STEVEN KOUFAKIS and MICHAEL KOUFAKIS,

Defendants.

--x

Case No. 16-CV-05320 (KAM)(RML)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY CERTIFICATION PURSUANT TO FAIR LABOR STANDARDS ACT

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PRELIMINARY STATEMENT

Defendants Star Nissan, Inc. John Koufakis Sr., John Koufakis Jr., Steven Koufakis, and Michael Koufakis oppose Plaintiffs' motion to proceed as a collective action on behalf of all current and former sales representatives of Defendants employed by Defendants between July 12, 2013 and the present. Plaintiffs have failed to establish by competent proof that Defendants have a policy that violated the Fair Labor Standards Act ("FLSA") with respect to Plaintiffs or similarly situated employees as required under 29 U.S.C. § 216(b). The evidence adduced by Plaintiffs is insufficient to justify conditional certification of the collective action as it does not establish that Defendants, together, maintained a common scheme or policy.

Plaintiffs incorrectly argue that they were required to be paid the minimum wage for all hours worked on a weekly basis. Indeed, the FLSA does not contain a provision concerning the frequency by which employees must be paid. Thus, the FLSA permits employers to utilize wages, such as excess commissions earned in a given time period, to apply to the minimum wage for other time periods. Plaintiffs' disregard of this fact is fatal to their motion.

Moreover, Plaintiffs' declarations fail to identify any weeks during the statutory period during which there were any FLSA violation nor do they identify any other sales representatives of Defendants who were allegedly paid below the minimum wage during the FLSA statutory period (or at any time). Plaintiffs' declarations merely state they are aware of other sales representatives who were paid a flat weekly rate. Plaintiffs' declarations do not address whether these individuals received insufficient commissions to bring them to the minimum wage. Plaintiffs also fail to describe the basis for their knowledge that other sales representatives were paid a flat weekly rate and fail to identify the time period during which these individuals were allegedly paid a flat weekly rate.

Additionally, the time period for which Plaintiffs seek to have a collective action certified is overbroad and the proposed notice contains several deficiencies.

Therefore, Plaintiffs' motion to proceed as a collective action under the FLSA must be denied. The statute of limitations should not be tolled.

STANDARD

In a putative FLSA collective action, district courts have discretion on whether to allow a collective action and direct that notice be given to potential class members. Madrid v. Minolta Business Solutions, Inc., 2002 U.S. Dist. LEXIS 18539 *2 (S.D.N.Y. October 1, 2002) citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165 (1989); Braunstein v. Eastern Photographic Labs., Inc., 600 F.2d 335, 336 (2d Cir. 1978). This discretionary power, however, must only be exercised in appropriate cases. Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265 (M.D. Ala. 2004); Haynes v. Singer Co., 696 F.2d 884, 886 (11th Cir. 1983). "The question, therefore, is ... whether the appropriate circumstances exist for the Court to exercise its discretion [to authorize notice] in this matter." See Hoffmann v. Sbarro, 982 F. Supp. 249, 261 (S.D.N.Y. 1997); Realite v. Ark Restaurants Corp., 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998).

To warrant the exercise of the court's discretion, a plaintiff must demonstrate that the potential class members are similarly situated. Realite, 7 F. Supp. 2d at 306; Mike v. Safeco Ins. Co., 274 F. Supp. 2d 216, 220 (D. Conn. 2003) ("[t]he threshold issue in deciding whether to authorize class notice in an FLSA action is whether the plaintiff has demonstrated that potential class members are similarly situated.")

Neither the FLSA nor its implementing regulations define the term "similarly situated." Hoffman, 982 F.Supp at 261. However, courts in this Circuit have held that to meet this burden of proof, plaintiffs must make a "modest factual showing sufficient to demonstrate that they and potential plaintiff are victims of a common policy or plan that violated the law." Mike v. Safeco Ins. Co. of Am., 274 F. Supp. 2d 216, 220 (D. Conn. 2003) (emphasis added); Hoffman, 982 F. Supp. at 261.

Courts in this Circuit look to several factors to determine whether members of a putative class are similarly situated, including (1) disparate factual and employment settings of the individual plaintiffs; (2) defenses available to defendants which appear to be individual to each plaintiff; and (3) fairness and procedural considerations counseling for or against notification of the class. Bogosian v. All Am. Concessions, 2008 U.S. Dist. LEXIS 78625 *17 (E.D.N.Y. Sept. 29, 2008).

A plaintiff must provide actual evidence of a factual nexus between his situation and those that he claims are similarly situated rather than mere conclusory allegations. Prizmic v. Armour, Inc., 2006 U.S. Dist. LEXIS 42627 *7 (E.D.N.Y. June 12, 2006). Absent such a factual showing, an employer may be "unduly burdened by a frivolous fishing expedition conducted by plaintiff at the employer's expense." Id. Thus, "[m]ere allegations in the complaint are not sufficient; some factual showing by affidavit or otherwise must be made." Camper v. Home Quality Mvnt. Inc., 200 F.R.D. 516, 519 (D. Md. 2000) (citations omitted); see also Rodolico v. Unisys Corp., 199 F.R.D. 468, 480 (E.D.N.Y. 2001) ("at the notice stage, courts 'require …substantial allegations that the putative class members were together the victims of a single decision, policy or plan'") (citations omitted) (emphasis added); Hall v. Burk, 2002 WL 413901, at *2 (N.D. Tex. Mar. 11, 2002) (denying motion for notice because "[u]nsupported assertions of widespread violations are not sufficient to meet Plaintiffs burden") (citation omitted); Jackson v. New York Tele. Co., 163 F.R.D. 429, 432 (S.D.N.Y. 1995) (plaintiffs required to "demonstrate a factual nexus that supports a finding that potential plaintiffs were subjected to a common discriminatory scheme"); Heagney v. European Am. Bank, 122 F.R.D. 125, 127 (E.D.N.Y. 1988) (requiring "some identifiable factual nexus which binds the named plaintiffs and potential class members together as victims of a particular alleged discrimination" quoting Palmer v. Reader's Digest Ass'n., 1986 WL 11458 *1 (S.D.N.Y. Oct. 3, 1986).

As discussed below, Plaintiffs have not met their burden.

POINT I

PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AS A COLLECTIVE ACTION MUST BE DENIED

A. Plaintiffs have not sufficiently established that they were subject to an unlawful common policy

Plaintiffs seek conditional certification of this matter as a collective action under 29 U.S.C. § 216(b) and request permission to send a notice to all sales representatives employed by Defendants at any point since June 12, 2013.

Plaintiffs argue that, under the FLSA, they were required to be paid the minimum wage rate on a weekly basis. (Plaintiffs' MOL at 4). Plaintiffs are wrong.

The FLSA does not contain a provision concerning the frequency by which employees must be paid, such as on a weekly or other basis. The FLSA merely says that employers "shall pay" a minimum wage. 29 U.S.C. 206(a).

Plaintiffs concede that commissions are wages and count towards the minimum wage. (Plaintiffs' MOL at 4). However, Plaintiffs completely disregard that commissions earned in a given period can be applied to the minimum wage for other periods. See Flick v. Am. Fin. Res., Inc., 907 F. Supp. 2d 274, 278 (E.D.N.Y. 2012). Plaintiffs have not produced any evidence which could establish that, when accounting for commissions earned in other pay periods, Plaintiffs were paid less than the applicable minimum wage.

Accordingly, Plaintiffs have failed to meet their burden of producing sufficient evidence that they were subject to a common policy that violates the law, and their motion should be denied.

B. Plaintiffs Fail to Account for Commissions Paid to Them By Nissan Motor Corporation USA for Work Performed at Star Nissan, Inc.

The FLSA does not specifically identify the types of remuneration that constitute the minimum wage. However, the FLSA defines "regular rate" of pay "to include all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). In any event, as discussed *supra*, Plaintiffs correctly concede that commissions count towards the minimum wage. (Plaintiffs' MOL at 4); see also Flick v. Am. Fin. Res., Inc., 907 F. Supp. 2d 274, 278 (E.D.N.Y. 2012).

Notwithstanding, Plaintiffs disregard as part of their minimum wage additional commissions they were paid by Nissan Motor Corporation USA pursuant to various incentive programs run by Nissan Motor Corporation USA relating solely to Plaintiffs' vehicle sales while they were employed by Star Nissan Inc. which incentives were offered to Plaintiffs because they sold Nissan vehicles during their employment with Star Nissan, Inc. (John Koufakis, Jr. Decl. ¶¶ 3-4). Because these additional commissions were paid directly by Nissan Motor Corporation USA, they do not appear on Plaintiffs' pay checks issued by Star Nissan Inc. (Id. ¶ 5). However, these additional commissions are wages earned by Plaintiffs for their work for Star Nissan Inc. Indeed, the commissions paid by Nissan Motor Corporation are directly attributed to Plaintiffs' sales of vehicles on behalf of Star Nissan Inc. while they were working for Star Nissan Inc. (Id. ¶ 6). Stated another way, but for Plaintiffs being employed by Star Nissan Inc., they would not have received commissions from Nissan Motor Corporation USA. Accordingly, the commissions paid to Plaintiffs by Nissan Motor Corporation USA are wages that must be used to satisfy the minimum wage requirements during their employment with Star Nissan Inc.

Because Plaintiffs rely exclusively on the compensation contained in the pay checks they received directly from Star Nissan Inc. and they disregard the remuneration they received from Nissan Motor Corporation USA, Plaintiffs have not included all commissions they earned during their employment with Star Nissan Inc. in concluding that they were not paid the minimum wage rate in some weeks that they worked for Star Nissan Inc. Accordingly, Plaintiffs' motion must be denied.

C. Plaintiffs Fail to Provide Any Specificity Regarding FLSA Violations

Plaintiffs' declarations provide insufficient details concerning alleged FLSA minimum wage violations.

First, Felix, Hotaranu, Rodriguez, and Cedeno declare that there were periods where they did not receive any commissions and were paid a flat rate of $100. However, they do not identify any specific period when this allegedly occurred. This sort of generalized and imprecise statement is not even sufficient to withstand a motion to dismiss. See Serrano v. I. Hardware Distribs., Inc., 2015 U.S. Dist. LEXIS 97876, *8 (S.D.N.Y. July 27, 2015); Johnson v. Equinox Holdings, Inc., 2014 U.S. Dist. LEXIS 91786, *13-14 (S.D.N.Y. July 2, 2014). Therefore, it is insufficient on a motion for collective action. Additionally, these general statements provided by Felix, Hotaranu, Rodriguez, and Cedeno that do not contain dates of any alleged minimum wage violations do not establish evidence of an alleged FLSA violation during the three year FLSA statutory period. See Fernandez v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 124692, at *50-51 (S.D.N.Y. Aug. 27, 2013) (denying motion for collective action where plaintiffs failed to produce any evidence establishing a violation of the FLSA during the three year FLSA statutory period).

Second, the declarations of Felix, Rodriguez,and Cedeno state that there were periods where they earned small commissions and they "do not think [they] earned the minimum wage" for those periods.[1] Felix Decl. ¶ 7; Rodriguez Decl. ¶ 7; Cedeno Decl. ¶ 7 (emphasis added). These thoughts of Felix, Rodriguez,and Cedeno that they "do not think" they earned the minimum wage for certain periods – rather than definitive statements that they were not paid the minimum wage for certain periods – are insufficient. Where, as here, the Plaintiffs are unable to establish FLSA violations with regard to themselves, there cannot be a collective action. See Vengurlekar v. Silverline Techs., Ltd., 220 F.R.D. 222, 230 (S.D.N.Y. 2003).

[1] Plaintiffs fail to provide any detail concerning the period of time during which this occurred.

D. Plaintiffs have not sufficiently established that there are similarly situated individuals who are subject to the same alleged unlawful policy as them

In order to establish a common policy in violation of the FLSA that was applied to other employees, Courts routinely require the submission of declarations from plaintiffs, which, at a minimum, identifies some other employees who were subjected to the same policy in violation of the FLSA, explains the manner in which the FLSA was violated, and provides details regarding the manner in which the declarants learned that an employer violated the FLSA with respect to the other individuals. See Reyes v. Nidaja, LLC, 2015 U.S. Dist. LEXIS 101728, *7 (S.D.N.Y. July 31, 2015) ("[W]here a plaintiff bases an assertion of a common policy on observations of coworkers or conversations with them, he must provide *a minimum level of detail* regarding the contents of those conversations or observations."); Martinez v. Zero Otto Nove, Inc., 2016 U.S. Dist. LEXIS 82232, *11 (S.D.N.Y. June 23, 2016) (same)

In this case, Plaintiffs Razvan Hotaranu and Luis Felix and opt-ins Gabriel Rodriguez and Lucas Cedeno[2] submitted declarations that merely identify the names of sales representatives who "were paid a flat weekly rate". These statements that other sales representatives "were paid a flat weekly rate" contain no evidence that other sales representatives were subject to a policy that in violated the FLSA.[3] Paying employees a flat weekly rate is not a violation of the minimum wage provision under the FLSA. Indeed, there is only an FLSA minimum wage violation if an employees' total remuneration divided by the hours worked brings them below the minimum wage.

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[2] Opt-in Kenneth Livingston did not submit a declaration.

[3] Plaintiffs' declarations do not address in any regard the commissions that these other sales representatives earned.

Lundy v. Catholic Health Sys. Of Long Island, Inc., 711 F.3d 106, 115 (2d Cir. 2013); Copper v. Cavalry Staffing, LLC, 132 F. Supp. 3d 460, 465 (E.D.N.Y. 2015); Hanming Feng v. Soy Sauce LLC, 2016 U.S. Dist. LEXIS 32820, 7-8 (E.D.N.Y. Mar. 14, 2016); McGlone v. Contract Callers Inc., 114 F. Supp. 3d 172, 173 (S.D.N.Y. 2015). Because Plaintiffs fail to identify any other employees who were subject to a policy that violates the minimum wage provision of the FLSA, their motion for a collective action must be denied. See Martinez v. Zero Otto Nove, Inc., 2016 U.S. Dist. LEXIS 82232, *12-13 (S.D.N.Y. June 23, 2016); Flores v. Osaka Health Spa, Inc., 2006 U.S. Dist. LEXIS 11378, *8 (S.D.N.Y. Mar. 16, 2006); Junjiang Ji v. Jling Inc., 2016 U.S. Dist. LEXIS 66013, *12-13 (E.D.N.Y. May 19, 2016); Fu v. Mee May Corp., 2016 U.S. Dist. LEXIS 53199 (S.D.N.Y. Apr. 20, 2016); Reyes v. Nidaja, LLC, 2015 U.S. Dist. LEXIS 101728 (S.D.N.Y. July 31, 2015); Lianyuan Feng v. Hampshire Times, 2015 U.S. Dist. LEXIS 29899, 7-8 (S.D.N.Y. Mar. 11, 2015).

Moreover, determining if the commissions of any sales representatives were insufficient to satisfy the minimum wage obligation would require an individual inquiry and analysis. See Myers v. Hertz Corp., 2006 U.S. Dist. LEXIS 100597 (E.D.N.Y. May 18, 2006) (denying motion for collective action where individualized inquiry concerning exempt status was necessary); Velasquez v. Digital Page, Inc., 303 F.R.D. 435, 442 (E.D.N.Y. 2014) (denying Rule 23 class action motion because individualized inquiry was necessary to determine if FLSA violations existed)[4]; Wallace v. Norcross Assocs.,

[4] Although Velasquez involved a Rule 23 motion, the reasoning in Velasquez should apply to the instant motion for collective action. Commonality requires that the class members have suffered the same injury. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (U.S. 2011). In Velasquez, to determine if the overtime exemption under 29 U.S.C. § 207(i) applied to the class required an individualized review of each particular class member to determine how many hours they worked in a given week; if they worked more than 40 hours per week; what was their regular rate of pay; did it amount to more than the minimum wage applicable at that time; did they earn commission, and if so, how much; and, did that amount of

LLC, 2014 U.S. Dist. LEXIS 48110 (N.D. Ga. Apr. 8, 2014) (denying motion for collective action where individual analysis would need to be performed for each commissioned employee to determine existence of violations of FLSA); Pelczynski v. Orange Lake Country Club, Inc., 284 F.R.D. 364, 369 (D.S.C. 2012) (denying motion for collective action that would require individualized assessment).

Moreover, even assuming *arguendo* that statements that other sales representatives "were paid a flat weekly rate" is evidence that other sales representatives were subject to a policy that violated the FLSA (which is not the case), Plaintiffs fail to describe the manner in which they learned that the other sales representatives were paid a flat weekly rate. They merely state that these other sales representatives were paid a flat weekly rate without any detail concerning how they learned this information. This is insufficient. See Mata v. Foodbridge LLC, 2015 U.S. Dist. LEXIS 70550, 9-13 (S.D.N.Y. June 1, 2015) (denying motion for collective action where the plaintiff did not state where or when his observations of and conversations with identified coworkers occurred); Sanchez v. JMP Ventures, L.L.C., 2014 U.S. Dist. LEXIS 14980, *5 (S.D.N.Y. Jan. 27, 2014) (same); Qing Gu v. T.C. Chikurin, Inc., 2014 U.S. Dist. LEXIS 53813, 10 (E.D.N.Y. Apr. 17, 2014) (denying motion for collective action where plaintiffs made only general allegations that other employees of defendants were denied minimum wage and overtime compensation, failed to provide any factual detail about the other employees, such as when they had conversations about not receiving minimum wage or overtime compensation, and failed to identify the job titles or duties performed

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commission constitute more than 50% of their compensation for that period. The Court denied the motion because of these individualized inquiries. Similarly, in this case, to determine if sales representatives are similarly situated, an inquiry regarding the amount of commissions they each received is necessary to determine if they were each paid minimum wages.

by their fellow employees); Eng-Hatcher v. Sprint Nextel Corp., 2009 U.S. Dist. LEXIS 127262 (S.D.N.Y. Nov. 13, 2009)(denying motion for collective action where plaintiff identified five individuals who worked at her store and told plaintiff they were not paid for overtime, but plaintiff provided no information about these conversations). As they do with themesleves, Plaintiffs also fail to identify the time period during which these other sales representatives were paid a flat weekly rate. Therefore, as with the Plaintiffs, there is no evidence that these other individuals were not paid the minimum wage during the statutory period.

Accordingly, Plaintiffs have not provided sufficient evidence establishing that Defendants' alleged common policy in violation of the FLSA applied to other employees.

POINT II

ASSUMING *ARGUENDO* THAT PLAINTIFFS' MOTION FOR COLLECTIVE ACTION CERTIFICATION IS GRANTED, PLAINTIFFS' PROPOSED NOTICE CONTAINS NUMEROUS DEFICIENCIES

If this Court grants Plaintiffs' motion for collective action certification (which, as discussed *supra*, it should not), Plaintiffs' proposed notice to putative class members ("notice") contains deficiencies which must be revised.

A. The Starting Date for Determining When Notice Should Be Sent Should Be Revised

Courts routinely hold that the notice should be sent to prospective class members who were employed by defendants beginning on the date of the Court's Order granting a plaintiff's motion for conditional collective action and going back three (3) years. See Zhirzhan v. AGL Industries, Inc., 14-7567 (E.D.N.Y Sept. 15, 2015, ECF Doc. No. 49); Guan v. Long Island Bus. Inst., 2016 U.S. Dist. LEXIS 106741, 14-15 (E.D.N.Y. Aug. 11, 2016); Ramos v. PJJK Rest. Corp., 2016 U.S. Dist. LEXIS 36324, 13 (S.D.N.Y. Mar.

10, 2016); Nahar v. Dozen Bagels Co., 2015 U.S. Dist. LEXIS 143839, 16 (S.D.N.Y. Oct. 20, 2015); Garcia v. Spectrum of Creations, Inc., 102 F. Supp. 3d 541, 551 (S.D.N.Y. 2015); Ritz v. Mike Rory Corp., 2013 U.S. Dist. LEXIS 61634 (E.D.N.Y. Apr. 29, 2013); Hernandez v. Immortal Rise, Inc., 2012 U.S. Dist. LEXIS 136556 *21 (E.D.N.Y. Sept. 24, 2012); Enriquez v. Cherry Hill Mkt. Corp., 2012 U.S. Dist. LEXIS 17036 (E.D.N.Y. Feb. 10, 2012); Flaum Appetizing Corp., 2009 U.S. Dist. LEXIS 80498 (S.D.N.Y. Aug. 17, 2009); Searson v. Concord Mortg. Corp., 2009 U.S. Dist. LEXIS 88926 (E.D.N.Y. Aug. 31, 2009); Laroque v. Domino's Pizza, LLC, 557 F. Supp. 2d 346, 355 (E.D.N.Y. 2008); Romero v. Doucoure v. Matlyn Food, Inc., 554 F. Supp. 2d 369, 373 (E.D.N.Y. 2008); Anglada v. Linens 'n Things, Inc., 2007 U.S. Dist. LEXIS 39105 (S.D.N.Y. Apr. 26, 2007); Lee v. ABC Carpet & Home, 236 F.R.D. 193, 199 (S.D.N.Y. 2006); Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 91, 98 (S.D.N.Y. 2003). Therefore, in the event that the Court grants Plaintiffs' motion for collective action (which it should not), notice should be sent only to prospective collective action members who were employed by Defendants three (3) years preceding the date of the Court's Order granting Plaintiffs' motion for conditional collective action.

Plaintiffs propose that notice be sent to employees that were employed by the Defendants since July 12, 2013 because the parties entered into a tolling agreement on July 12, 2016. However, as Plaintiffs correctly note, the tolling agreement was terminated by Defendants on September 15, 2016, and was therefore in effect for merely two months. No individuals have opted into this case since it was commenced on September 26, 2016. Plaintiffs provide no basis or legal authority in support of their argument that the beginning date of the three year period for notice to be sent should be the date of execution of a tolling agreement that was subsequently terminated. Accordingly, the notice should be distributed to employees who worked within the three years immediately preceding the Court's Order if the Court grants Plaintiffs' motion (which it should not grant).

Even assuming *arguendo* that the tolling agreement has any bearing on the starting date for distribution of notice, the period should be limited to three years prior to the two month period during which time the tolling agreement was effective, i.e. employees employed between July 12, 2013 and September 15, 2013 in addition to three years prior to the date of the Court's Order on the motion for collective action.

B. The Notice Should Not Reference Any Claims Other Than Alleged Minimum Wage Violations

On page 1 of Plaintiffs' proposed notice, it states "[t]he lawsuit claims that Defendants failed to pay the proper minimum wages, overtime pay and commissions as well as other wages required by the law" and in other areas of the notice, it references NYLL claims. These references to NYLL claims and claims for commissions (under a breach of contract theory) must be revised.

The Complaint does not allege FLSA overtime violations because commissioned salespersons at automobile dealerships are exempt from overtime under the FLSA. See 29 U.S.C. § 213(b)(10). Therefore, references to overtime claims must be deleted.

Although commissioned salespersons at automobile dealerships are also exempt under the NYLL, Plaintiffs allege a violation of NYLL for failure to pay overtime at the rate of time and one-half of the minimum wage rate. However, NYLL adopts the FLSA overtime exemptions. See 12 N.Y.C.R.R. § 142-2.2. Moreover, courts have rejected the argument that NYLL requires employees exempt under the FLSA to be paid time and one-half of the minimum wage rate for hours worked in excess of forty. See Marcus v. AXA Advisors, LLC, 307 F.R.D. 83, 95 (E.D.N.Y. 2015) ("Plaintiffs' interpretation renders the regulation internally contradictory and conflicts with Circuit precedent holding that New York's overtime requirement is to be read as incorporating the FLSA's exemptions.")

In any event, a collective action under 29 U.S.C. 216(b) concerns only claims under the FLSA, and not under the NYLL or for breach of contract. Indeed, Plaintiffs acknowledge this as they state on page 2 of the notice: "[i]n particular, this notice relates to claims that the Defendants violated federal law by failing to pay sales representatives the proper minimum wage. "References to the NYLL and to plaintiffs' other non-FLSA claims are apt to confuse potential plaintiffs about the nature of this action." See Little v. Carlo Lizza & Sons Paving, Inc., 160 F. Supp. 3d 605, 612 (S.D.N.Y. 2016). Plaintiffs have failed to comply with their obligations under Fed. R. Civ. Proc. 26 by providing a computation of each category of damages. However, upon information and belief, Plaintiffs are seeking substantially more in damages for their breach of contract claims concerning commissions than for alleged minimum wage violations. Plaintiffs should not be permitted to use the instant motion as a vehicle to solicit potential clients with regard to these other claims.

Accordingly, the notice should not reference any claims under than Plaintiffs' sole claim under the FLSA for minimum wage violations.

C. Contact Information for Defendants' Counsel Should Be Stated on the Notice

Courts routinely permit the notice to contain the name, address, and telephone number of Defendants' counsel. See Zhirzhan v. AGL Industries, Inc., 14-7567 (E.D.N.Y Sept. 15, 2015, ECF Doc. No. 49); Guan, 2016 U.S. Dist. LEXIS 106741 at 16; Slamna v. API Rest. Corp., 2013 U.S. Dist. LEXIS 93176, 12 (S.D.N.Y. June 27, 2013); Moore v. Eagle Sanitation, Inc., 276 F.R.D. 54 (E.D.N.Y. 2011); Gjurovich, 282 F. Supp. 2d 101 at 108; Cano v. Four M Food Corp., 2009 U.S. Dist. LEXIS 7780 (E.D.N.Y. Feb. 3, 2009). Therefore, Defendants respectfully request that their counsel's name, address, and telephone number be included on the notice.

D. Notice Should Be Returnable to the Clerk of the Court

"The common practice in the Eastern District is to have opt-in plaintiffs send their consent forms to the Clerk of the Court rather than to plaintiffs' counsel." Sharma v. Burberry Ltd., 52 F. Supp. 3d 443, 462 (E.D.N.Y. 2014) (collecting cases). Accordingly, the notice should be made returnable to the Clerk of the Court.

E. The Notice Should Not Be Ambiguous Regarding Individuals' Rights to Not Participate

On page 2 of the proposed notice under the section entitled "Ask to Be Included", the sentence "If you wish to be included, you must complete the form at the end of this Notice" should be revised to state "If you wish to be included in this lawsuit and represented by Fitapelli & Schaffer LLP, you must complete the form at the end of this Notice". Additionally, the next section, entitled "Do Nothing", must be revised to reflect that recipients of the notice have the right to not join this action and do not lose the right to bring their own action. As currently written in the proposed notice, a layperson likely will not understand that if they do not join this lawsuit, they do not lose any rights.

Additionally, paragraph 10 of the proposed notice should be deleted as it is misleading to a layperson because it states that recipients will not be able to participate in the federal portion of this lawsuit if they do not join this lawsuit. Recipients can pursue the federal claims on their own if they choose to not join the lawsuit. This information is already covered in the suggested revised section of the "Do Nothing" section discussed *supra*.

POINT III

ASSUMING *ARGUENDO* THAT PLAINTIFFS' MOTION IS GRANTED, PLAINTIFFS' PROPOSED METHOD OF DISSEMINATION OF THE NOTICE CONTAINS DEFICIENCIES

Defendants object to Plaintiffs' request that Defendants provide Plaintiffs with *inter alia,* phone numbers (including cell phone numbers) and personal e-mail addresses.

Due to privacy concerns, courts do not require the production of this information until a large number of notices are returned as undeliverable. See Mohamed v. Sophie's Cuban Cuisine, Inc., 2015 U.S. Dist. LEXIS 126012, 13-15 (S.D.N.Y. Sept. 21, 2015); Colozzi v. St. Joseph's Hosp. Health Ctr., 595 F. Supp. 2d 200, 201 (N.D.N.Y. 2009)("[P]laintiffs have no need for the additional, inherently private information sought, including e-mail addresses, telephone numbers, social security numbers, and dates of birth."); Arevalo v. D.J.'s Underground, Inc., 2010 U.S. Dist. LEXIS 109193, 7 (D. Md. Oct. 13, 2010) (denying plaintiffs' motion to compel defendants to produce phone numbers for the putative plaintiffs); Campbell v. PriceWaterhouse Coopers, LLP, 2008 U.S. Dist. LEXIS 44795, 7-8 (E.D. Cal. June 5, 2008) (holding that telephone numbers should not be released unless notification of putative plaintiffs by first class mail is insufficient). Therefore, it is premature for the Court to order Defendants to produce telephone numbers, e-mail addresses, and dates of employment at this juncture.

Moreover, Rule 7.3 of the New York Rules of Professional Conduct specifically prohibits Plaintiffs' counsel from soliciting potential clients by telephone and text message. See New York Rules of Professional Conduct 7.3. Since it would violate Rule 7.3 of the New York Rules of Professional Conduct for Plaintiffs' counsel to solicit potential opt-ins by telephone and text message, Defendants should not be ordered to produce telephone numbers of its current and former employees who Plaintiffs' counsel does not represent. In fact, the mere fact that Plaintiffs are asking for telephone numbers shows Plaintiffs' counsels' desire to violate the Rules of Professional Conduct. The Court should not countenance such behavior and enable Plaintiffs' counsel to violate the Rules of Professional Conduct.

Further, Defendants also oppose Plaintiffs' proposal that, in addition to distributing the notice via First Class Mail, notice be sent by electronic mail and text message to potential opt ins' last known email addresses and cell phones, and that notice be posted at Defendants' business location. "In selecting the manner of issuing the notice, th[e] court must strike the appropriate balance in ensuring notification to the former [employees] while minimizing disturbance to [the employer's] business." Hallissey v. Am. Online, Inc., 2008 U.S. Dist. LEXIS 18387, *9 (S.D.N.Y. Feb. 19, 2008). If Defendants are required to mail the notices to putative class members, it is repetitive, and unwarranted to also email and text the notice to putative class members, and to require Defendants to also post the notice in their workplace since the contact information of current employees will be accurate. See Zhirzhan v. AGL Industries, Inc., 14-7567 (E.D.N.Y Sept. 15, 2015, ECF Doc. No. 49); PAL v. Sandal Wood Barn Grill, Inc., 2015 U.S. Dist. LEXIS 5279 (S.D.N.Y. Jan. 15, 2015) ("since defendants will be required to provide plaintiffs with contact information for past and current employees, posting of notice" at the workplace is unnecessary); Aponte v. Comprehensive Health Mgmt., 2011 U.S. Dist. LEXIS 60882 at *22 (S.D.N.Y. June 1, 2011) (rejecting plaintiffs' request to post at defendants' offices the notice and consent to join a FLSA collective action, holding that "First Class mail is a sufficient to provide potential class members with notice in this case"); Shajan v. Barolo, Ltd., 2010 U.S. Dist. LEXIS 54581, at *5 (S.D.N.Y. June 2, 2010) ("Since all current employees will be receiving the notice, there is no need to require defendants to post the notice in the workplace."); Han v. Sterling Nat'l Mortg. Co., 2011 U.S. Dist. LEXIS 103453 (E.D.N.Y. Sept. 14, 2011)(premature to require employer to post notice in workplace); Mowdy v. Beneto Bulk Transp., 2008 U.S. Dist. LEXIS 26233, *31-32 (N.D. Cal. 2008) (refusing to require employer to post notice in workplace). Additionally, there is no evidence of a high turnover rate among employees that warrants distribution by text message. Therefore, Defendants respectfully request that the notices be mailed to the putative class members, and not emailed to them or posted in the workplace.

Defendants also oppose Plaintiffs' proposed reminder letter presumably to be mailed to the putative class members. The reminder notice would constitute an attempt to take "another bite at the apple", could be interpreted as encouragement by the Court to join the lawsuit, and could be construed as badgering prospective plaintiffs. See Tenemaza, et al v. 1404 N&A Rest Corp., 13-CV-04006 (ECF document no. 28 at 6) (S.D.N.Y. Nov. 7, 2013) (LGS) ; Knispel v. Chrysler Group LLC, 2012 U.S. Dist. LEXIS

21188 (E.D. Mich. Feb. 21, 2012) ("There shall not be any 'reminder notice' provided. Plaintiffs have requested such reminder notices in other cases in this district and those requests have been denied because they are unnecessary and could potentially be interpreted as encouragement by the Court to join the lawsuit"); Witteman v. Wisconsin Bell, Inc., 2010 U.S. Dist. LEXIS 8845 (W.D. Wis. Feb. 2, 2010) ("the reminder is unnecessary and potentially could be interpreted as encouragement by the court to join the lawsuit"); Robinson v. Ryla Teleservices, Inc., 2011 U.S. Dist. LEXIS 147027 (S.D. Ala. Dec. 21, 2011) (adopting the reasoning in Witteman and denying the plaintiffs' request to send a reminder notice to the putative class); Smallwood v. Illinois Bell Tel. Co., 710 F. Supp. 2d 746, 753-54 (N.D. Ill. 2010) ("[A] reminder is unnecessary and potentially could be interpreted as encouragement by the Court to join the lawsuit.") (internal quotation marks omitted).

POINT IV

THE STATUTE OF LIMITATIONS SHOULD NOT BE TOLLED

Tolling is appropriate "only in rare and exceptional circumstances," Phillips v. Generations Family Health Ctr., 723 F.3d 144, 150 (2d Cir. 2013). Courts in this circuit have found equitable tolling appropriate in the following situations: (1) "where the plaintiff actively pursued judicial remedies but filed a defective pleading during the specified time period,"; (2) "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," (additional citations omitted); or (3) "where a plaintiff's medical condition or mental impairment prevented her from proceeding in a timely fashion." Courts have also found extraordinary circumstances to exist that warrant equitable tolling where an employee demonstrates that "it would have been impossible for a reasonably prudent person to learn of the cause of action . . . or if the defendant concealed from the plaintiff the existence of the cause of action." Arena v. Plandome Taxi, Inc., 2013 U.S. Dist. LEXIS 58169, 3-4 (E.D.N.Y. Apr. 23, 2013) (internal citations omitted) (denying request to equitably toll the statute of limitations for unnamed, unknown class members).

Plaintiff does not argue that any of these circumstances are present in this case.

In a collective action lawsuit, like this case, the statute of limitations period continues to run with respect to each potential opt-in's collective action claim until that plaintiff files a written consent form opting into the suit. See 29 U.S.C. § 256; Lee v. ABC Carpet & Home, 236 F.R.D. 193, 198-99 (S.D.N.Y. 2006); Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 260 (S.D.N.Y. 1997) ("[O]nly by 'opting in' will the statute of limitations on potential plaintiffs' claims be tolled.")

Notwithstanding 29 U.S.C. § 256, Plaintiffs argue that equitable tolling should apply while the Court decides the instant motion. Plaintiffs are effectively seeking to have the statute of limitations tolled as a matter of course for all potential opt-ins in all cases on the day when a motion for collective action is filed. This result is plainly contrary to the procedural rules under 29 U.S.C. § 256 that govern FLSA collective actions. Individuals cannot rely solely on a collective action notice to learn about their potential claims. It is not the responsibility or obligation of Plaintiff's attorney or the Court to notify potential opt-ins about potential claims they may have against Defendants. As succinctly stated by the Western District of New York:

> Pursuit of that right is not dependent on the commencement or certification of a collective action, and a reasonably diligent person could have acted by pursuing an individual or collective action for relief.

Hinterberger v. Catholic Health Sys., 2009 U.S. Dist. LEXIS 97944, at *47 (W.D.N.Y. Oct. 20, 2009) and Gordon v. Kaleida Health, 2009 U.S. Dist. LEXIS 95729, at *41-42 (W.D.N.Y. Oct. 13, 2009).

Accordingly, there is no basis for which the Court should toll the statute of limitations for potential opt-ins. See Alcantara-Flores v. Vlad Restoration Ltd, 2017 U.S. Dist. LEXIS 14824 (E.D.N.Y. Feb. 2, 2017); Garcia v. Chipotle Mexican Grill, Inc., 2016 U.S. Dist. LEXIS 153531, *31-32 (S.D.N.Y. Nov. 3, 2016); Apolinar v. R.J. 49 Rest., LLC, 2016 U.S. Dist. LEXIS 65733 (S.D.N.Y. May 18, 2016); Ramos v. PJJK Rest. Corp., 2016 U.S. Dist. LEXIS 36324, *15-16 (S.D.N.Y. Mar. 10, 2016); She Jian Guo v. Tommy's Sushi Inc., 2014 U.S. Dist. LEXIS 147981 (S.D.N.Y. Oct. 16, 2014); Kim Man Fan v. Ping's on Mott, Inc., 2014 U.S. Dist. LEXIS 54170 (S.D.N.Y. Apr. 14, 2014); Whitehorn v. Wolfgang's Steakhouse, Inc., 767 F. Supp. 2d 445, 449-50 (S.D.N.Y. 2011).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for conditional certification of this action as a collective action should be denied in its entirety.

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